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IN THE

Supreme Court of the United States

October Term—1950

No. 229

BERTRAM WASHINGTON, *et al.*,

Petitioners,

against

J. HOWARD McGRATH, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable the Chief Justice of the Supreme Court and the Associate Justices of the Supreme Court of the United States:

The petitioners herein pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the dismissal of the complaint by the United States District Court for the District of Columbia.

Statement of the Matter Involved

The complaint sets forth a representative action brought by twenty-six employees of the Post Office Depart-

ment on behalf of themselves and all other federal employees similarly situated challenging the constitutionality of Executive Order 9835 and action taken thereunder by respondents. The full text of the Order is annexed to the complaint as Exhibit "A" (R. 26-36).

After appropriate jurisdictional recitals (Pars. "First" and "Second" (R. 3)), the complaint identifies the respondents: Tom C. Clark, the then Attorney General of the United States (Par. "Third" (R. 3)) (J. Howard McGrath was substituted for Tom C. Clark by an order dated October 14, 1949 (R. 142)); Jesse M. Donaldson, Postmaster General of the United States (Par. "Fourth" (R. 3)); the Chairman and two other members of the Post Office Department Loyalty Board (Par. "Fifth" (R. 3)); and the chairman and twenty-one other members of the Loyalty Review Board of the Civil Service Commission (Par. "Sixth" (R. 3-4)).

The petitioners are Post Office clerks, delivery men, etc., who have served in the Post Office Department in Cleveland, Detroit, New York, Philadelphia and Plainfield for periods ranging from a few months to close to thirty years (Pars. "Ninth" through "Thirty-fourth" (R. 4-9)).

Each of the aforesaid petitioners has received a written notice of proposed removal action from the Post Office Department Loyalty Board (Pars. "Seventh" (R. 4) and "Forty-Second" (R. 12-13)), which notice recites that "reasonable grounds exist for the belief that the [charged] employee is disloyal to the Government of the United States" (Par. "Forty-third" (R. 13)).

The complaint describes the procedure pursuant to which said notices were issued. Executive Order 9835 was promulgated on March 21, 1947 (Par. "Thirty-fifth" (R. 10)) and renders each agency head responsible for a program to assure that "disloyal" civil service employees in his department are dismissed (Par. "Thirty-sixth" (R.

10)). In the Post Office Department, the respondent Donaldson appointed the respondents Jackson, Frank and Alford as the Post Office Department Loyalty Board (Par. "Thirty-seventh" (R. 10)). Supervising and coordinating the activities of the Post Office Department Loyalty Board, as well as the various agency loyalty boards, is the Civil Service Commission Loyalty Review Board which also acts as the final reviewing board concerning agency dismissals on loyalty grounds (Pars. "Thirty-eighth", "Thirty-ninth" (R. 10-11)).

The standards for the determination of "loyalty" are set out in detail in Part V of the Order and in Paragraph "Forty-first" of the complaint (R. 11-12). Ostensibly to implement the foregoing standards, the Attorney General prepared lists of proscribed organizations without notice of hearing to any listed organization; those lists were thereafter publicly released (Par. "Fortieth" (R. 11)).

The proposed removal notice received by each petitioner was issued allegedly under the authority of the foregoing program (Pars. "Forty-second" (R. 12-13), and "Forty-third" (R. 13)). None of the aforesaid notices alleged that the proposed removal was predicated upon any of the affirmative acts or actions inimical or contrary to the best interests of the United States Government specified in Sections 2a-2c of Part V of the Order; instead each such notice

> "* * * recited either membership in, affiliation with or sympathetic association with designated organizations; and/or association with named or unnamed individuals alleged to be communists, communist sympathizers, or fellow-travelers; and/or sympathy with the adherence to communism or the Communist Party line; and/or the reading, subscription to or distribution of certain named books, papers, magazines or book clubs" (Paragraph "Forty-fourth" R. 13))

The complaint alleges, and the respondents have not denied or controverted that:

> "None of the plaintiffs herein have at any time advocated the overthrowal or performed any acts, or conspired or attempted to perform any acts to overthrow the Government of the United States, or to deny to other persons the right under the Constitution of the United States, by force or violence or in any other manner." (Paragraph "Forty-fifth" (R. 13)).

The complaint thereafter proceeds to enumerate the administrative status of the various cases at the time the suit was filed: three of the petitioners had requested, but not yet received, a hearing; fourteen had requested and received a hearing before the Post Office Department Loyalty Board, but no decision had yet been rendered in their cases; five of the petitioners had been suspended pending an appeal from an adverse decision from the Post Office Department Loyalty Board to the Postmaster General Donaldson; three of the petitioners had been suspended after a hearing before the Post Office Loyalty Board and pending an appeal to the respondent Donaldson; and one of the petitioners, James A. Bruno, had been suspended after exhausting his appeal to the Postmaster General (Pars. "Forty-sixth" through "Fiftieth" (R. 13-15)).

The complaint alleges that the foregoing action of the respondents had caused irreparable damage to the petitioners and all other federal employees similary situated in that

> "Those plaintiffs who have been suspended have thereby been deprived of valuable property rights; and their ability to obtain other employment has thereby been seriously impaired for the reason that the stigma of a determination of disloyalty has prejudicially affected their economic status and their ability to earn a livelihood. All the plaintiffs herein as well as all other federal employees who have re-

> ceived notices of proposed removal on charges of disloyalty, have thereby been villified and subjected to public shame, disgrace, ridicule, and obloquy which has seriously prejudiced their reputation and standing in the community and among their friends. All of the plaintiffs herein as well as all federal government employees similarly situated have suffered serious and irreparable injury in that Executive Order No. 9835, on its face and as applied, has acted as a prior restraint upon and inhibited their exercise of their constitutional rights of freedom of speech, press, assembly, religion and assembly." (Par. "Fifty-first" (R. 15-16))

The foregoing injurious action of the respondents is alleged to be arbitrary, capricious and unlawful in that it is unsupported by any evidence and unwarranted by the facts (Par. "Fifty-second" (R. 16)).

The action of the respondents is further alleged to be unlawful and unconstitutional for the following reasons:

1. The Executive Order inflicts penalties for the exercise of First Amendment rights, although there is no danger, clear and present or otherwise, to justify the Order (Par. "Fifty-third A" (R. 16));

2. The Executive Order acts as a prior restraint on the exercise of the First Amendment rights of petitioners "as well as all present and prospective civil servants" although there is no danger, clear and present or otherwise, to justify the Order (Par. "Fifty-third B" (R. 17));

3. The Executive Order has no reasonable or rational basis, nor is it a reasonable or rational means for accomplishing a constitutional objective (Par. "Fifty-third C" (R. 17));

4. The Executive Order has been construed and applied so as to discriminate wilfully and intentionally

against Negroes and Jews, and those active and militant in combatting religious and racial discrimination in the Post Office Department (Par. "Fifty-third D" (R. 18));

5. The Executive Order inflicts punishment on the basis of past acts and associations which were legal and permissible when performed (Par. "Fifty-third E" (R. 18));

6. The Executive Order attempts to grant power which is exclusively judicial in nature to the executive branch (Par. "Fifty-third F" (R. 18-19));

7. The Executive Order attempts to usurp powers not specifically delegated to the federal government (Par. "Fifty-third G" (R. 19));

8. The Executive Order establishes standards in conflict with those set up by the Congress for the removal of federal employees on grounds of disloyalty (Par. "Fifty-third H" (R. 19));

9. The standards employed in the Executive Order are so vague and indefinite as to be incomprehensible as a guide to government employees, and incapable of impartial administration by the respondents (Par. "Fifty-third I" (R. 19)); and

10. The Executive Order deprives petitioners of their liberty and property without procedural due process of law in that the charges are vague and general; petitioners have been unable to obtain specifications by way of a bill of particulars; there has been no disclosure of the derogatory sources or of the derogatory information against the charged employee; charged employees are assumed to be guilty of the charges made; charged employees possess no compulsory process power; the hearings are closed;

determinations are made upon evidence not part of the record or otherwise disclosed to the charged employees; determinations are made upon the basis of association and without regard to personal guilt or innocence; and the charged employees are bound by the designation of organizations by the Attorney General, although said employees are afforded no opportunity to participate in the hearing or proceedings from which such designation results (Par. "Fifty-third J" (R. 19-23)).

Upon the foregoing allegations the complaint prays for a declaration that the Executive Order is unconstitutional, and for appropriate temporary and permanent injunctive relief.

Respondents moved to dismiss the complaint and for summary judgment on the grounds that none of the petitioners, with the possible exception of Bruno, had exhausted his administrative remedy; that since all of the procedural requirements had been met in the case of Bruno, there can be no judicial review of the correctness of the executive determination even in his case; that none of the constitutional objections raised has any merit; and that no claim upon which relief can be granted has been stated against the then respondent Tom C. Clark (R. 37). In support of the foregoing motions the respondents submitted the affidavit of Harry B. Mitchell, President of the United States Civil Service Commission (R. 38-51), and the affidavit of the respondent Roy C. Frank, one of the members of the Post Office Department Loyalty Board (R. 63-77).

The status of the various petitioners at the time of and according to Frank's affidavit was as follows: five of the petitioner-employees submitted answers to the charges but did not request hearings and were suspended upon an adverse determination; fifteen of the petitioners had requested and had hearings but no decision had yet been

rendered therein; four petitioners had requested hearings and had been suspended following an adverse determination; one petitioner had been cleared by the Post Office Loyalty Board after a hearing; and one petitioner had been dismissed after a hearing and appeals through the Civil Service Commission Loyalty Board (R. 66-76).

The District Court rejected respondents' contention concerning the alleged failure of petitioners to exhaust their administrative remedies. Judge HOLTZOFF reasoned that since, as conceded, at least one petitioner had exhausted his administrative remedies in this representative class action, the petitioners have standing to sue. Thereafter the motion to dismiss was granted principally on the grounds that while "the Government may not imprison a person for making various uterances, * * * it may, if it sees fit to do so, dismiss a Government employee who makes such utterances" (R. 133) for alleged disloyalty—even if occasioning "devastating consequences to the employee in question" (R. 136)—and such dismissal need not comply with due process requirements since, according to the District Court, those requirements "do not apply to the employer-employee relationship as between the Government and its employees" (R. 136). By an order dated July 5, 1949 the District Court dismissed the complaint for the foregoing reasons (R. 136) but did not rule upon the respondents' motion for summary judgment.

By opinion dated April 17, 1950, the Court of Appeals for the District of Columbia Circuit by a vote of 2-1, affirmed the District Court (R. 139-140). The Court of Appeals decided the constitutional issues herein by citing and relying upon its decisions in *J. A. F. R. C.* v. *Clark*, 177 F. 2d 79; *Friedman* v. *Schwellenbach*, 159 F. 2d 22; *Bailey* v. *Richardson*, 182 F. 2d 46; and *I. W. O.* v. *McGrath*, (decided March 22, 1950, not yet reported) (R. 140). As to the allegations of racial and religious discrimination in the administration of the Order, the Court of Appeals

held that upon consideration of the affidavits submitted by respondents "there would * * * appear to be no genuine issue of fact upon the subject" (R. 140).

EDGERTON, *J.*, dissented for the reasons stated by him in his dissent in *Bailey* v. *Richardson, supra* (R. 140).

Opinions Below

The decision of the District Court is reported at 84 F. Supp. 964. The opinion of the Court of Appeals has not been officially reported.

Jurisdiction

The judgment of the Court of Appeals affirming the order of dismissal of the complaint was dated April 17, 1950 (R. 141). Thereafter, by order signed by Mr. Chief Justice VINSON of this Court and dated June 29, 1950, the time for petitioners to file their petition for writ of certiorari was extended to and including August 1, 1950.

The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 of the United States Code.

Statutes and Orders Involved

1. Executive Order 9835 (12 Fed. Reg. 1935):

   See Exhibit "A" attached to complaint (R. 26-36).

2. Hatch Act, Section 9A (Act of Aug. 2, 1939, c. 410, § 9A, 53 Stat. 1148, 5 U. S. C. A. § 118j);

   "(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any

political party or organization which advocates the overthrow of our constitutional form of government in the United States.

(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person."

Questions Presented

1. Whether Executive Order 9835 is invalid in that it usurps the judicial power which was exclusively vested in the judiciary by Article III of the United States Constitution.

2. Whether Executive Order 9835 violates the Due Process Clause of the Fifth Amendment in that its operative terms are vague, indefinite and undefinable.

3. Whether Executive Order 9835, on its face and as applied, violates the Due Process Clause of the Fifth Amendment in that it does not provide for a full, fair and open hearing to employees charged with disloyalty.

4. Whether upon the facts alleged in the complaint, Executive Order 9835 abridges First Amendment rights in violation of the Fifth, Ninth and Tenth Amendments to the United States Constitution.

5. Whether upon the facts alleged in the complaint, Executive Order 9835 violates the Fifth Amendment to the United States Constitution in that respondents are alleged to have wilfully and intentionally administered the Order in such a manner as to discriminate against Jews, Negroes and those active and militant in combatting racial and religious discrimination.

Specification of Errors

It was error for the Court of Appeals for the District of Columbia Circuit to affirm the order of the District Court granting the motion of respondents to dismiss the complaint.

Summary of Argument

The writ should be granted for the same reasons which impelled this Court to review *J. A. F. R. C.* v. *McGrath,* 339 U. S. 910; *National Council of American-Soviet Friendship, Inc.* v. *McGrath,* 94 L. ed. 764 (Oct. Term 1949, No. 554, May 15, 1950); *Bailey* v. *Richardson,* 94 L. ed. 920 (Oct. Term 1949, No. 766, June 5, 1950).

More particularly, this Court is not precluded from considering the constitutional questions raised herein on the grounds that petitioners have no absolute right in government employment. Irrespective of the nature of the petitioners' property right in their government jobs, *United States* v. *Lovett,* 328 U. S. 303, establishes that the dismissal and proscription from federal employment of the petitioners under the Executive Order constitutes punishment. A government employee may not be dismissed and proscribed from federal employment as disloyal, and thereby punished, for reasons of race or religion, nor may he be thus punished without a full, fair and open hearing, nor may he be thus punished for the exercise of First Amendment rights where, as is here alleged, there is no clear and present danger to justify such dismissal. Since upon the facts as alleged in the complaint the Executive Order does discriminate against petitioners in their federal employment for reasons of race and religion, and concededly subjects petitioners to dismissal without a fair hearing, and does expose petitioners to dismissal and

proscription from federal employment as disloyal for the exercise of First Amendment rights in an innocuous fashion, it was error to dismiss the complaint on motion. Moreover, the Executive Order violates the principle of separation of powers in that it permits the executive to exercise powers which under the Constitution are vested exclusively in the judiciary. And, finally, the Executive Order is in violation of the Fifth Amendment to the United States Constitution for the reason that the operative standards in the Order are so vague and nebulous that they are incapable of comprehension by those subject to the sanctions of the Order. In thus establishing vague standards, the Executive Order accords the administrators of the Order an unlimited discretion with respect to the regulation of First Amendment rights in violation of the First Amendment as construed by this Court.

For all of the foregoing reasons, the Executive Order is invalid and it was error to dismiss the complaint and thereby preclude petitioners from offering evidence to establish and sustain the allegations of the complaint.

REASONS RELIED ON FOR ALLOWANCE OF WRIT AND BRIEF IN SUPPORT OF PETITION

I.

The petition herein presents "Questions whose resolution will have immediate importance far beyond the particular facts and parties involved * * * tremendously important principles, upon which are based the plans, hopes, and aspirations of a great many people throughout the country."*

In the 1948 Term of the Court certiorari was granted in *Parker, et al.* v. *County of Los Angeles, et al.*, 337 U. S. 929, where petitioners challenged the validity of test oaths required under the so-called "Loyalty Check" program adopted by the Board of Supervisors of the County of Los Angeles. The writ was granted for the reason, as stated for the Court by Mr. Justice FRANKFURTER, that "serious questions seemed raised as to the scope of a state's power to safeguard its security with due regard for the safeguards of liberty assured by the Due Process Clause of the Fourteenth Amendment." *Parker, et al.* v. *County of Los Angeles, et al.*, 338 U. S. 327, 329. Constitutional questions similar to those which "seemed raised" in *Parker, et al.* v. *County of Los Angeles, et al.*, are here in fact raised.

In the last Term of the Court it was decided to review challenges to the constitutionality of Executive Order 9835 brought by certain of the organizations proscribed thereunder (*J. A. F. R. C.* v. *McGrath, supra; National Council of American-Soviet Friendship, Inc.* v. *McGrath, supra*) and by one individual dismissed from the employ of the federal government (*Bailey* v. *Richardson, supra*)

* VINSON, C. J., address to American Bar Association, September 7, 1949, reported at 69 Sup. Ct. V, VI.

allegedly pursuant to the Order. The instant petition raises the constitutional issues presented in the cases already before this Court and, in the opinion of petitioners, poses other related issues which require resolution by this Court if Executive Order 9835 is to receive full consideration and disposition by the Court.

Accordingly, as the reasons for which the Court has previously granted certiorari in cases involving the constitutionality of the federal and state loyalty programs are here present and reinforced by the special facts and issues posed by the complaint herein, the writ should be allowed.

II.

The grounds of decision assigned by the Court of Appeals for the District of Columbia are in conflict with the applicable decisions of this Court.

The conflict between Executive Order 9835 and the decisions of this Court construing the First, Fifth, Ninth and Tenth Amendments has been the subject of extensive briefing before the Court. In view of the wise admonition by VINSON, *C. J.*, to counsel "in preparing petitions for certiorari, to spend a little less time discussing the merits of their cases" (69 Sup. Ct. V, VI), petitioners do not duplicate all the arguments already made concerning the validity of the Executive Order but, instead, rely upon and respectfully refer the Court to the discussion at pages 18 to 51 of the brief of petitioners filed in *J. A. F. R. C.* v. *McGrath*, October Term 1949, No. 556. Petitioners will confine their argument upon this petition to the proposition that the Executive Order, on its face and as applied, violates the Due Process Clause of the Fifth Amendment in that it does not provide for a full, fair and open hearing to employees charged with disloyalty.

A.

Government Employees Have the Right Not to be Dismissed as "Disloyal" Without Due Process of Law

It is exceedingly dubious whether the right to a hearing and due process of law depends upon the existence of an absolute and vested property right. In *L. B. Wilson, Inc.* v. *F. C. C.*, 83 App. D. C. 176, 170 F. 2d 793, it was held that a broadcast licensee is constitutionally entitled to participate in any hearing or proceeding wherein his license may be modified by the issuance of a license to another station. And similarly it has been held that the revocation of mailing privileges may not be constitutionally effected without notice and hearing to the interested parties. *Pike* v. *Walker*, 73 App. D. C. 289, 121 F. 2d 37, 38, 39, *cert. den.* 314 U. S. 625; *Walker* v. *Popenoe*, 80 App. D. C. 129, 149 F. 2d 511; *Standard Airlines* v. *C. A. B.*, 177 F. 2d 18.

> "The doctrine that privileges may be taken away or adversely affected without giving their holders an opportunity to be heard on disputed adjudicative facts is pernicious. To allow administrative officials summarily to destroy a profitable business when adjudicative facts are denied is unsound government. A procedure which is unfair for inflicting a penalty is not rendered fair by using it to withdraw a benefit. Happily, the pervasive judicial indulgence in conceptualism about privileges is largely limited to language and is decisive of relatively few cases." Davis, "The Requirement of Opportunity to be Heard in the Administrative Process", 51 *Yale Law Journal* 1093, 1141, 1142; see also, *ibid.*, at 1118-1125, and particularly page 1124 n. 118; *Gellhorn, Administrative Law* (1st ed. 1940) pages 372-382.

It is unnecessary, however, to establish that no federal employee may be dismissed without a hearing or other-

wise to inquire into the precise nature of the property interest which a federal employee has in his job. For irrespective of the right to a hearing of a government employee in the ordinary dismissal situation, where the employee is charged with and suspended or dismissed on "loyalty" grounds he is entitled to notice and hearing.

In *United States* v. *Lovett*, 328 U. S. 303, the Court had before it an appropriation statute passed by the Congress which provided that no salary or compensation should be paid to three named individuals. The statute was enacted after the Congress had determined that those individuals entertained "subversive" beliefs and engaged in "subversive" associations. The Court, in an opinion written by Mr. Justice BLACK, held that statute to be invalid on the grounds that the statute

> "• • • clearly accomplished the punishment of named individuals without a judicial trial. The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal. • • • The effect was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule.' The Constitution declares that that cannot be done either by a state or by the United States." (328 U. S. at 316-317)

The plain import of the decision and the foregoing language was that one cannot be dismissed from federal employment on grounds of "disloyalty", and thereby punished, without the safeguards and guaranty of due process of law. For the Court considered that

> "This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type." (328 U. S. at 316)

Unless it be said that the executive may do that which the Congress may not, that is, brand an individual as "disloyal" and dismiss and bar him from federal employment without a fair hearing and trial, the ruling in *Lovett* squarely and precisely dictates that the petitioners herein are entitled to a fair hearing as to the disputed question of their loyalty. Upon such hearing the Government owes to each petitioner the following obligation:

> "• • • he must be clearly informed of the charge against him, the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted by the witnesses against him, he must not be compelled to incriminate himself." (328 U. S. at 317-318)

It would be anomalous if in the face of the multiple constitutional procedural safeguards imposed upon judicial or legislative action which results in a stigmatizing official judgment (see *United States Constitution,* Article I, §3 (cl. 6, 7), §9 (cl. 3), §10 (cl. 1); Article III, §2 (cl. 3); Amendment V; Amendment XIV, §3), the executive branch, which is governed by the Due Process Clause of the Fifth Amendment, could find and brand an individual as "disloyal" without affording that individual the minimum elements comprised within the concept of due process of law. Every aspect of the action taken under the Executive Order is quasi-judicial if not wholly judicial in nature and they plainly dictate the applicability of the safeguards implicit in the due process requirements of the Fifth Amendment. The determination of political orthodoxy is vulnerable to sufficient abuse without removing from that determination the proper restraint imposed by a full, fair and open hearing. The ruling and rationale of *Lovett* require that the loyalty of federal employees be probed and ascertained only by means of a judicial trial or its due process equivalent, a full and fair administrative hearing.

Nor can *Lovett* be distinguished as involving a proscription from future federal employment more permanent than the bar to such future employment imposed under the Executive Order. The named individuals in *Lovett* were to be paid "no salary or compensation * * * out of any monies then or thereafter appropriated * * * unless they were prior to November 15, 1943 again appointed to jobs by the President with the advice and consent of the Senate" (328 U. S. at 305) while any employee dismissed under Executive Order 9835 may "thereafter" receive "no part of the funds appropriated by any act of Congress" for the position from which the employee was removed (Hatch Act, Section 9A (2), 5 U. S. C. A. § 118j (2)). Indeed, as it is required that "there shall be a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the Federal Government" (Executive Order 9835, Part I (1)), it is clear that an employee dismissed pursuant to Executive Order 9835 is effectually banned from any future federal employment. Consequently, since petitioners here are subject to action at least as drastic in immediate and prospective effect as that inflicted upon the named individuals in *Lovett* it follows that petitioners here, as the named individuals in *Lovett* may not be charged, dismissed and barred from future federal employment as disloyal except by a procedure which comports with the requirements of due process.

As the Government does not cease to exercise its special powers and prestige *qua* employer neither does it cease to be subject to the limits imposed upon governmental action by the Constitution. Thus as Government *qua* employer enjoys powers and immunities denied to private employers (see, *e. g., United States* v. *United Mine Workers of America,* 330 U. S. 258), Government *qua* employer is deemed bound by the limitations of the Constitution (see,

e. g., United States v. *Lovett, supra*), and the prohibitions of the Bill of Rights (*United Public Workers* v. *Mitchell,* 330 U. S. 75, 95, 100), including the prohibition that Government *qua* employer may not discriminate on grounds of race or creed, although apart from statute private employers are not subject in law to any of the foregoing limitations. The full answer to any analogy between the private employer and the governmental employer is, then, that the Constitution defines and delimits governmental action not private action. Consequently, this Court is bound not by the rights of a private employer *vis-a-vis* his employees but by the determination in *Lovett* that the United States Government, *qua* employer or otherwise, may not inflict the grave punishment of dismissing and barring an individual from federal employment except in a manner which complies with the requirements of the Due Process Clause of the Fifth Amendment.

B.

Executive Order 9835, on its Face and as Applied, Does Not Provide for a Full, Fair and Open Hearing to Employees Charged with Disloyalty

Part of the record before this Court is comprised of transcripts of loyalty hearings in which several of the petitioners were parties. No attempt will here be made to analyze in detail each hearing separately. The procedural administration of the Order as set out in the complaint is undenied; indeed it was acknowledged below that the procedure under the Executive Order does not comply with due process requirements (R. 135-136). Moreover, the hearings are uniform and patterned as appears from the transcripts. The petitioners will therefore proceed by presenting a composite picture of a typical "loyalty hearing."

Where a post-office employee has not heard from his friends, his neighbors, his co-workers, or his janitor that Federal Bureau of Investigation agents have been inquiring into his associations, his beliefs and his reading habits, he first learns that his loyalty is in issue when he receives a proposed removal notice from the Post Office Department Loyalty Board. In no instance does that notice allege any personal activity or advocacy for the overthrow of the American form of government. Instead, almost each employee is charged with "sympathetic association" with communists or "fellow-travelers", who are unnamed and unspecified, or he is accused of following the "Communist Party line", again without any specification as to the time or particulars thereof (see R. 87-120); in addition to these vague "boiler-plate" charges, some employees are charged with membership in or association with a proscribed organization and, upon occasion, specific events or activities in connection with such membership or association are charged.

When the charged employee requests a bill of particulars as to whether he has ever advocated or taken any action to overthrow our form of Government or for a bill of particulars with respect to those charges which are broad and general in nature, that request has been uniformly and consistently refused. Such refusal violates the principle that "Even in administrative proceedings where the rules of procedure are relaxed, the party moved against has the right to be heard, the essence of which is to be fully advised of the allegations comprising the claim against him." *Commissioner* v. *West Production Co.*, 121 F. 2d 9, 11, *cert. den.*, 314 U. S. 682; see also *Takeo Tadano* v. *Manny*, 160 F. 2d 665, 667.

Left to his own devices to ascertain the precise particulars upon which the charge is based, the charged employee

then sets about to prepare to prove his loyalty. He submits his answers under oath to the charges as best he can, in view of the vagueness of the charges, and he then undertakes to obtain the testimony—oral or written—of character or factual witnesses who may assist him in his presentation. But he soon discovers that fellow government employees are fearful of appearing or testifying on behalf of a charged employee, because such assistance might itself be deemed "sympathetic association" with a "subversive"; while private citizens are similarly fearful of "sympathetic association" with a charged employee because they are apprehensive of the future consequences of such association to them or to members of their families. The reluctance and fear of persons to testify on behalf of charged employees is irremediable for neither the employee nor the Loyalty Board has the power to compel the attendance of a witness at a hearing; and if the witness appears and at the hearing should decide not to answer a particular question, neither the charged employee nor the Loyalty Board has the power to compel him to testify. This aspect of the hearing afforded charged employees should be compared with the right of an accused to compulsory process as guaranteed by Amendment VI to the United States Constitution (see *United States* v. *Burr*, Fed. Cas. 14, 692d; *Morton* v. *United States*, 79 App. D. C. 329, 147 F. 2d 28, *cert. den.* 324 U. S. 875), and those cases wherein compulsory process has been held and assumed to be an element of due process required as part of a fair hearing (*Washington ex rel. Oregon R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 525; *Missouri* v. *North*, 271 U. S. 40, 42; *Jewell* v. *McCann*, 95 Ohio St. 191, 116 N. E. 42).

Further in preparation for this hearing, the charged employee searches his memory and his background to ascertain who might have been the source of derogatory information. Success in surmising who is a derogatory

source is of little benefit to the charged employee, for he cannot compel by process the hostile witness to appear and testify under oath as to those matters which the hostile witness may have related to a Federal Bureau of Investigation agent in secrecy and without an oath. The charged employee is thereby deprived of the opportunity to compel a known derogatory source to substantiate under oath that which he has told the investigating authorities or to demonstrate by cross examination that the hostile witness gave derogatory information for reasons of bias or malice.

Thus hampered in his preparation for the hearing, the charged employee then proceeds to the hearing itself.

That hearing is conducted, not at an open and public session as is customary with respect to the trial of a grave and infamous charge, but at a closed and secret session which may be attended only by the charged employee, his representative, the members of the Loyalty Board and the witness during the period he is testifying. The Anglo-American tradition of a public and open trial, which originated and developed as a safeguard against secret, political trials wherein Star Chamber abuses might be perpetrated without public knowledge thereof (*In re Oliver*, 333 U. S. 257; Radin, "The Right to a Public Trial", 6 *Temple Law Q.* 381; see *United States* v. *Sing Tuck*, 194 U. S. 161, 179 (BREWER, *J.*, dissenting)), is thus blandly disregarded.

At the outset of the hearing the charged employee may request that the evidence against him be presented and that he be confronted with that evidence in order that he may contest and rebut it. This is consistently and almost without exception denied. If no further procedural vice inhered in loyalty hearings, this one vice would require the declaration that the Order is invalid.

> "Suppression of evidence or its concealment from a party whose rights are being determined by

the administrative tribunal, has been held to be so unfair as to invalidate the administrative proceedings." *Lloyd Sabaudo Societa* v. *Elting,* 287 U. S. 329, 339, 340, citing with approval *Lewis* v. *Johnson,* 16 F. 2d 180, 182.

> "The provision for a hearing implies that the applicant is entitled to an opportunity to hear all the evidence, and examine on cross examination the witness as in other cases. Any other procedure would impose upon the applicant the burden of refuting a case resting upon evidence and considerations of which he could have no knowledge." *Saltzman* v. *Stromberg-Carlson Tel. Mfg. Co.,* 60 App. D. C. 31, 46 F. 2d 612, 614.

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing parties and to meet them." *Morgan* v. *United States,* 304 U. S. 1, 18.

As was stated in *Powhattan Mining Co.* v. *Ickes,* 118 F. 2d 105, where an order based on unrevealed information treated as confidential was held invalid:

> "Full hearing includes the right to cross examination * * * we have seen no other instance in which such an administrative agency has, by adopting rules which provide for tabulations based on secret materials within its own possession, created evidence to be used against the parties to a controversy before the administrative agency, and has ruled that the evidence cannot be attacked by the ordinary methods of cross examination. We think that this procedure violates the essential canons of fairness laid down by the Supreme Court." (118 F. 2d 109)

Similarly it was pointed out in *Chew Hoy Quong* v. *White,* 249 F. 869, 870:

> "* * * there clearly is no warrant for basing decision, in whole or in part, on confidential communications, the source, the motive, or contents of

> which are not disclosed to the applicant or her counsel, and where no opportunity is afforded them to cross examine, or offer testimony in rebuttal thereof, or even to know that such communication has been received."

The hearing does not, therefore, commence with a presentation of the case against the charged employee; instead he is instructed to go forward and present his evidence to prove his loyalty or to disprove his disloyalty. Consequently, both in a substantive and procedural sense the burden of proof is imposed upon the charged employee although it has been held that "In administrative proceedings as well as criminal or other civil proceedings it is the rule that accusers or the one who makes the charge has the burden of proof." *Magnolia Petroleum Company* v. *NLRB,* 112 F. 2d 545, 548. The burden of proof thus imposed upon the charged employee is rendered particularly onerous by the circumstance that almost without exception he is not confronted with any of the evidence, written or oral, upon which the charges are predicated but has for his guide only the vague and general charges contained in his removal notice.

The charged employee submits those character witnesses who find within themselves the courage to testify for a charged employee, and the employee then proceeds under oath to profess his loyalty and fealty to the Government and to the people of the United States. Occasionally he attempts to disprove membership in or association with an organization, but absent any affirmative evidence or proof which he can test as to credibility, sufficiency, competency, etc., the charged employee finds himself with the virtually insuperable task of proving that he is *not* a member of or associated with an organization. It will readily be appreciated that the proof of the negative of a fact is exceedingly difficult where there is no affirmative evidence to rebut.

The employee is, having submitted his direct presentation, expected to submit to questioning under oath by the Loyalty Board. Failure thus to waive his privilege against self-incrimination would make dismissal for disloyalty a certainty. The bulk of loyalty hearings are therefore devoted to attempts by Loyalty Boards to prove charges of disloyalty out of the mouths of the charged employee.

The employee having completed his "hearing" the Board then retires to consider all the "evidence". Of course that "evidence" includes not only the evidence which appears in the transcript and the record provided the charged employee, but it will also include the secret and confidential Federal Bureau of Investigation reports which relate or are based upon rumor, gossip, hearsay, and the statements of unsworn informants although it is settled that where an administrative proceeding involves important personal rights or liberties, then hearsay and other unsworn testimony is incompetent and inadmissible. *Bridges* v. *Wixon,* 326 U. S. 135, 153. In its deliberations the Board studies and relies upon evidence not disclosed to the charged employee to rebut or to test for credibility, competency, interest or bias in direct violation of the best settled rule concerning due process of law in an administrative hearing, *i.e.,* that the agency may not consider evidence, and base its decision upon evidence, which is not part of the record. *Chicago Junction Case,* 264 U. S. 258, 263; *Crowell* v. *Benson,* 285 U. S. 22, 48; *West Ohio Gas Co.* v. *Public Utilities Commission,* 294 U. S. 63, 69, 70; *Interstate Commerce Commission* v. *Louisville & N. Ry. Co.,* 227 U. S. 88, 91, 92, 93 ("All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense"); *Ohio Bell Telephone Co.* v. *Public Utilities*

Commission, 301 U. S. 292; *Morgan* v. *United States,* 304 U. S. 1; *United States* v. *B. & O. S. W. Ry.,* 226 U. S. 14, 20; *Kwock Jan Fat* v. *White,* 253 U. S. 454.

Indeed, the fantastic procedure employed at loyalty "hearings" renders the Board as well as the charged employee suspect so that the Board is compelled to rely upon evidence from informants *whose identity is not revealed even to the Loyalty Board itself.* Plainly the use as evidence of information which comes from informants whose identity is not revealed to the adjudicating tribunal is a violation of the Due Process Clause. *Colyer* v. *Skeffington,* 265 F. 20; *Kwock Jan Fat* v. *White,* 253 U. S. 454, 459. In fact, the necessity of disclosure is so great that it has been held that the police authorities may be compelled to disclose the identity of a confidential informant who is not a witness where his identity may be essential to prove the innocence of an accused. *Wilson* v. *United States,* 59 F. 2d 390, 392; *United States* v. *Li Fat Tong,* 152 F. 2d 650, 652; 8 *Wigmore on Evidence* (3rd ed.) Sec. 2374, page 756.

Thereafter the Loyalty Board proceeds to make its decision. As alleged in the complaint (Paragraph "Fifty-third J (10)" (R. 22)), the sole inquiry made by the Board is whether the charged employee is a member of or affiliated or associated with a designated organization. In short, the determination of loyalty or disloyalty is made without any regard or proof as to whether the charged employee committed any acts, advocates or even believes in the overthrow of our Government by force or violence. Instead, guilt or innocence is predicated entirely upon the principle of guilt by association. This phase of the procedure here under review is fatally defective. For in our system of jurisprudence guilt is personal only and accordingly the principle of "guilt by association" has met with uniform judicial repudiation. *Herndon* v. *Lowry,* 301 U. S. 242,

260; *Kessler* v. *Strecker,* 307 U. S. 118; *Bridges* v. *Wixon,* 326 U. S. 135; *Kottaekos* v. *United States,* 328 U. S. 750, 772; *United States* v. *Hauck,* 155 Fed. 2d 141, 144; President's Committee on Civil Rights, *To Secure These Rights,* page 50; *Chaffee, Free Speech in the United States* (2d ed. 1941), pages 167, 470, 484, see also concurring opinion of JACKSON, *J.,* in *Krulewitch* v. *United States,* 336 U. S. 440.

The application of the foregoing principle is particularly defective in the administration of the Order since the charged employee may not at this hearing question whether the organization with which he is charged to have associated is, in fact, "subversive". That determination was made by the Attorney General without notice or hearing to the proscribed organization itself, and is deemed by the Loyalty Board to be binding (R. 22-23) in contrast with the elementary proposition that one may not be bound by a determination made in a proceeding to which the individual is not a party (*Pennoyer* v. *Neff,* 95 U. S. 714; *Postal Telegraph Cable Company* v. *Newport,* 247 U. S. 464; *Old Wayne Mutual Life Association* v. *McDonough,* 204 U. S. 8) or otherwise inadequately represented (*Hansberry* v. *Lee,* 311 U. S. 32). Bound by that determination, the charged employee is then vulnerable to dismissal if he is found guilty of associating with an organization whose status as a subversive organization was finally and irrevocably determined by the Attorney General in an *ex parte* proceeding to which the charged employee was not a party.

Many, if not all, the foregoing procedural transgressions of the Due Process Clause occasioned by the administration of the Executive Order might be exculpated if the affected employee were entitled thereunder to full judicial review of the facts and the evidence. *Jordan* v. *American Eagle Fire Ins. Co.,* 83 App. D. C. 192, 169 F. 2d 281. But

the Executive Order does not provide for any right to judicial review from a determination made as to the employee's loyalty. On the contrary, the federal employee who is branded as "disloyal" and then seeks judicial relief from that stigma is confronted with the contention, as are the petitioners here by the ruling of the District Court, that the determination of "disloyalty" is an exercise of the exclusive and unreviewable executive discretion (R. 135) and the doctrine that an executive official may not be sued for libel or slander.

Thus terminates the "hearing" which the charged employee has on the question of his loyalty.

As compared with the foregoing recital of a typical loyalty proceeding, this Court is requested to compare the recent definition of the minimum guarantees contained in the Due Process Clause:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *In re Oliver,* 333 U. S. 257, 273.

A "loyalty hearing" as provided by the respondents under the Executive Order falls so far short of the foregoing minimum guarantees that, it is respectfully submitted, this Court has no alternative but to declare that the Executive Order on its face and as applied fails to provide the basic elements of procedural due process to charged employees.

CONCLUSION

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia to review its judgment.

Respectfully submitted,

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